

Nos. 413PA21

TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, INC. et
al.,

REBECCA HARPER, et al.,

COMMON CAUSE,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in
his official capacity as Chair of the
House Standing Committee on
Redistricting, et al.

Defendants.

From Wake County
No. 21 CVS 015426
No. 21 CVS 500085

STATE DEFENDANTS' BRIEF

The State of North Carolina, the North Carolina State Board of Elections, its Members, and its Executive Director (“State Board” and collectively, the “State Defendants”) provide this brief to inform the Court of its position and certain election related considerations.

State Defendants’ Position

State Defendants take no position on the merits issues before the Court.

Instead, the State Defendants provide this response to inform the Court of certain considerations that arise from modification to the election schedule, and to request that the Court consider clarification of the Court’s 8 December 2021 Order as discussed below.

On 19 January 2022, the General Assembly passed H.B. 605, which addressed election related issues. However, on Friday, 28 January 2022, the Governor vetoed this legislation. As certain administrative issues remain unresolved, the State Board respectfully requests that this Court provide clarification and direction to address these issues ahead of the upcoming elections.

A. Request for Clarification of 8 December 2022 Order.

In the 8 December 2021 Order moving the 8 March 2022 election to 17 May 2022, this Court enjoined Defendants from conducting “elections for any public offices” and directed Defendants to “hold primaries for all offices” on 17

May 2022. In response to that specific language, the State Board has learned that some local governments have raised the issue that the language of the 8 December 2021 Order did not expressly move all ballot items, including referenda, that would have appeared on the 8 March 2022 ballot to 17 May 2022.

Although the State Board believes this Court's 8 December 2021 Order intended to move all contests from 8 March 2022 to 17 May 2022, and it can direct county boards of elections to act accordingly, it lacks the authority to direct local county and municipal governments to interpret the order in that manner.

Therefore, the State Board respectfully requests clarification in this appeal that the December 8, 2021 Order moved all ballot items to be voted on by North Carolinians on the 8 March 2022 ballot, to the 17 May 2022 ballot.

B. Request for Clarification of Second Municipal Election Date.

State Defendants affirmatively request clarification regarding the election date for any second municipal election that follows the 17 May 2022 election, in the absence of a second primary for a non-municipal office under N.C.G.S. § 163-111. The need for this request arises from the inoperability of certain provisions of Session Law 2021-56, which moved the 2021 municipal elections to 8 March 2022 to account for the delay in census data. Under that session law, any second municipal election (*see* N.C.G.S. §§ 163-291, -293, -

294) would follow the schedule of any second primary for a nonmunicipal office that is called for under the provisions of N.C.G.S. § 163-111(e). Such a second primary would take place seven weeks after the primary, or ten weeks if there is a federal contest involved. *See* N.C.G.S. § 163-111(e). However, Session Law 2021-56 set 26 April 2022 as a date certain for any second municipal elections when a second primary is not required. As this date is no longer possible, clarification is required.

State Defendants previously made a similar request to the trial court, but withdrew it when Legislative Defendants indicated that the General Assembly intended to take up this issue, which it did in H.B. 605.

As H.B. 605 has not become law, State Defendants respectfully request that any order from this Court also set 26 July 2022 as the date certain for a second municipal election if a second primary is not required under N.C.G.S. § 163-111. This is consistent with the second primary date for federal contests in N.C.G.S. § 163-111(e) and avoids an election day immediately following the July 4th holiday, which would be the case if the non-federal second primary date of 5 July 2022 were used.

C. Additional Considerations if the Election Were Modified.

Because the potential remedy of modifying the election date has been raised in briefing to this Court, State Defendants felt it would be prudent to alert the Court to two anticipated issues that would arise if that occurs.

First, if the election date is moved to a new date, State Defendants request relief related to processing absentee ballot requests. Pursuant to N.C.G.S. § 163-230.2, voters requesting absentee ballots must indicate the specific election date for which they are seeking an absentee ballot (currently 17 May 2022¹). Although the State Board believes such requests should still be valid if the primary date were moved, recent legislation has made it a class I felony for any election worker to “knowingly send[] or deliver[] an absentee ballot to any person who has not requested an absentee ballot in accordance with the requirements of Chapter 163 of the General Statutes” N.C.G.S. § 163-237(d7). The prospect of felony punishment could have a chilling effect on election officials merely trying to carry out their duties in the face of a legal ambiguity concerning whether an absentee ballot request for an election occurring on a certain date is still valid if the date of that election is subsequently moved.

Accordingly, if the primary date is modified, the State Board respectfully requests that any such order clarify that absentee ballot requests submitted for the 17 May 2022, 5 July 2022, or 26 July 2022 election dates shall be considered valid for the corresponding new election dates.

Second, if the election were scheduled for a later date, and a second

¹ <https://s3.amazonaws.com/dl.ncsbe.gov/Forms/English-Non-Fillable-2022-Absentee-Ballot-Request-Form.pdf>

federal primary was required, this may result in post-election administrative procedures that interfere with the start of absentee voting for the general election. If that occurs, State Defendants may seek further direction from the appropriate court at that time related to shortening those administrative processes or the time period for absentee voting ahead of the general election from 60 days to as few as 45 days. *See* N.C.G.S. § 163-22(k).²

As the foregoing issues in this section arise only if the primary date is moved from 17 May 2022, State Defendants seek relief for these issues only in the event that the Court orders the primary date be modified as part of any remedial proceedings, if required.

CONCLUSION

State Defendants respectfully request that the Court consider the requests above. Should the Court require further information, the State Board is prepared to address any questions at oral argument and to provide supplemental filings as needed.

² Any time period shorter than 45 days would violate the federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”). 52 U.S.C. § 20302(a)(8)(A). This time period could only be shortened further through a waiver request submitted by the State Board to the federal official designated to administer UOCAVA. *See* Affidavit of Karen Brinson Bell, ¶ 10, attached to the Harper Plaintiffs’ Initial Appendix at 480-483.

Respectfully submitted this 28th day of January, 2022.

N.C. DEPARTMENT OF JUSTICE

Electronically Submitted

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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed
below have authorized me to list their
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CERTIFICATE OF SERVICE

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This the 28th day of January, 2022.

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